SUPREME COURT, U.S.
FILED
AUG 31 2005
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No. 05-285

In The

Supreme Court of the United States

WENDY LALANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE ELEVENTH CIRCUIT IS CORRECTLY APPLYING PLAIN ERROR REVIEW TO SENTENCES PURSUANT TO *UNITED STATES V. BOOKER* WHERE THE ELEVENTH CIRCUIT IS APPLYING PLAIN ERROR REVIEW IN A MANNER WHICH CONFLICTS WITH OTHER CIRCUITS AND WHERE ALL THREE CO-PETITIONERS WERE SENTENCED TO LOWEST END OF GUIDELINE RANGE AND DISTRICT JUDGE STRUGGLED WITH SUBSTANTIAL MOTION FOR DOWNWARD DEPARTURE.

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PETITION FOR A WRIT OF CERTIORARI

The Eleventh Circuit denied relief under *United States v. Booker*, 543 U.S. ___, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005), in an opinion that incorrectly applies the plain error analysis, conflicts with other circuits, and condemns the petitioner to serve an illegal sentence.

OPINIONS BELOW

The opinions of the Eleventh Circuit are *United States v. Lalani*, No. 04-11114 (11th Cir. April 12, 2005) and *United States v. Lalani*, No. 04-11114-II (11th Cir. June 8, 2005) and are attached hereto as Appendices A and B of this Petition.

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by Title 28, United States Code, § 1254. This petition seeks review of a judgment by a panel of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit Court issued an unpublished opinion affirming the conviction and sentence on April 12, 2005. The petitioner filed a petition for reconsideration and for rehearing *en banc* which was denied on June 8, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

(i) Course of Proceedings

Petitioner Wendy Lalani is a 37 year old mother of two. Her husband, co-petitioner Amzad Lalani is the 42 year old father of their two children. Neither have any criminal history.

Petitioner Wendy Lalani was arrested, as were numerous co-defendants, on March 14, 2002 on a 138 count indictment, alleging a conspiracy to transport in interstate commerce stolen goods, as well as related substantive counts. The trial commenced on September 8, 2003 and concluded with a conviction on September 17, 2003. She was free on bond until her voluntary surrender to serve the 63 month sentence imposed after conviction at trial. Petitioner Lalani is presently incarcerated and serving a custodial sentence of 63 months. Her husband, co-petitioner Amzad Lalani is serving a custodial sentence of 121 months.

(ii) Statement of Facts

In the year 2000, Amzad Lalani, who owned a convenience store, went into the wholesale distribution business, selling typical convenience store items, such as razors and over the counter medications. The business was called Amber Distributors. The facts urged by the government were essentially that cooperating defendant Mohammad Gaffar conducted a theft and fencing operation out of his own convenience store in Atlanta, Georgia, using his employees to purchase stolen merchandise from "boosters" and then sell it to Amber Distributors or other customers with wholesale businesses.

At sentencing, the District Judge himself characterized the trial testimony regarding Wendy Lalani as follows:

> **I think I do agree with you Ms. Cherniak, that the number of occasions in the record that showed her participation and her presence were random and only a few.**

Wendy Lalani has been married to Amzad Lalani since she was 19 years old. The government alleged that Wendy Lalani participated in the conspiracy by "cleaning" the merchandise at Amber Distributors. The government alleged that the total value of all the merchandise handled by the conspiracy was over $13 million. At sentencing the court found that the retail value of said merchandise was $9 million. That value drove the sentencing calculation under the then mandatory guideline scheme. In addition to the amount of loss, other guideline sentencing enhancements were applied at sentencing which were found by the judge, not by the jury beyond a reasonable doubt. The trial court sentenced all three of the co-petitioners to

the lowest end of the guideline range. The trial court struggled with Ms. Lalani's motion for downward departure based on significant family responsibilities, but denied same believing that it could not depart unless her circumstances were even more extraordinary than they were.

Ms. Lalani's sentencing occurred before this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004). However, the evidence for a lower sentence presented by Ms. Lalani was substantial and compelling. Ms. Lalani married her husband, co-petitioner Amzad Lalani, at 19 to escape an abusive home with an alcoholic father. She worked in her husband's convenience store from 1995 until 2000. In 2000, when her husband opened the wholesale distribution business, she went to work there until the date of her arrest in March 2002. She remained successfully on bond from March 2002 until she reported to serve her 63 month sentence in June 2004.

As presented at sentencing, Ms. Lalani's sister was diagnosed with AIDS when she was just 19 years old and later had a child out of wedlock. Her child, Aaron, was 15 years of age at the time of sentencing. He was born HIV positive. On September 19, 2003, Ms. Lalani's sister died from AIDS related illnesses after spending many months in hospital and hospice care. Upon his mother's death, Aaron was simply dropped off at a stranger's house by the mother's boyfriend, resulting in his custody initially being with the Florida Department of Children and Family. Through Wendy Lalani's efforts, Aaron came to live with her family in May 2003. Not only was this a struggle financially, but also emotionally, as Aaron only reads on a third grade level and suffers from mental health problems.

As further presented to the sentencing court, Ms. Lalani's own son, Adam, has a learning disability and is enrolled in a special education program. Ms. Lalani persevered to get Adam a partial scholarship to a private school that specialized in addressing Adam's unique needs, and struggles to pay the difference in the cost of his education by family efforts to curb spending. Details of both Aaron's and Adam's special needs were presented to the sentencing court. In addition, Aaron's therapist noted that a change in Aaron's environment could be devastating for the child.

Other factors presented to the sentencing court were the fact that both parents would be simultaneously incarcerated and that Ms. Lalani's mother was quite old and infirm. In addition, more traditional sentencing information was presented, such as letters from friends, neighbors, teachers and co-workers who wrote of their respect and admiration for Wendy Lalani and all she contributes to her family and the community.

The District Court seemed moved by the facts and struggling with what he believes to be a "problem under our present system of law," noting,

> I had a recent case with like 18 defendants where many of the defendants were single mothers that had simply been brought into a situation where they were used to carry checks, fraudulent and forged checks, to a bank. They knew what they were doing. They knew it was wrong, but it resulted in their children not having the support they needed, and I'll have to agree with you that's a series [sic] situation, and it's certainly a problem under our present system of law.
>
> But I tell you quite frankly that I wouldn't know what to say to one of those people if I treated Ms.

Lalani differently when her situation is not more extraordinary than many of those.

Thus, it was evident that the District Court was troubled by what he perceived to be a lack of discretion to give a lower sentence under these types of circumstances.

Wendy Lalani appealed her conviction on several grounds, raising numerous trial and sentencing issues, including *Blakely* and *Booker* issues. After a very active oral argument, with lengthy discourse on many of the significant issues raised on appeal, the conviction and sentence was affirmed. A petition for rehearing *en banc* followed, which again denied relief based upon *United States v. Rodriguez*, 398 F. 3d 1291 (11th Cir.), *cert. denied*, 162 L. Ed. 2d 866, 125 S. Ct. 2935 (2005).

REASON FOR GRANTING THE WRIT

I. WHETHER THE ELEVENTH CIRCUIT IS CORRECTLY APPLYING PLAIN ERROR REVIEW TO SENTENCES PURSUANT TO *UNITED STATES V. BOOKER* WHERE THE ELEVENTH CIRCUIT IS APPLYING PLAIN ERROR REVIEW IN A MANNER WHICH CONFLICTS WITH OTHER CIRCUITS AND WHERE ALL THREE CO-PETITIONERS WERE SENTENCED TO LOWEST END OF GUIDELINE RANGE AND DISTRICT JUDGE STRUGGLED WITH SUBSTANTIAL MOTION FOR DOWNWARD DEPARTURE.

Judge Posner of the United States Court of Appeals for the Seventh Circuit has said of the Eleventh Circuit's tortured plain error analysis in *Blakely* pipeline cases:

> **[W]e cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence.**

See United States v. Paladino, 401 F. 3d 471, 485 (7th Cir. 2005) (emphasis added). Numerous other courts have similarly directly criticized the Eleventh Circuit's interpretation of plain error under *Booker*. *See United States v. Coles*, 403 F. 3d 764 (D.D.C. 2005) (criticizing the Eleventh Circuit's decision in *Rodriquez*, infra, and following the Seventh Circuit approach to simply ask the district judge whether a different sentence would have been given); *United States v. Hughes*, 401 F. 3d 540 (4th Cir. 2005) (noting that the Eleventh Circuit's language "demonstrates a fundamental misunderstanding of what it means to affect substantial rights"); *United States v. Williams*, 399 F. 3d 450 (2d Cir. 2005) (criticizing Eleventh Circuit approach, noting, "no reason to risk leaving in place a sentence that might be materially lower or higher" than the one that would have been imposed absent the error).

In *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770 (1993), this Court held that in order to satisfy the plain error test, the defendant must demonstrate (1) error, (2) that it is plain, and (3) that it affects substantial rights. If these three conditions are met, an appellate court may then exercise its discretion to notice the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544 (1997).

The Eleventh Circuit has held, like the other circuits, that a *Booker* error is an error which is plain. *See United States v. Rodriguez*, 398 F. 3d 1291 (11th Cir. 2005). Where the Eleventh Circuit's plain error analysis conflicts with

the other circuits is what is the standard for meeting the third prong of the analysis, i.e., what type of record is sufficient to show a reasonable probability of a different result. *See id.*

The Eleventh Circuit has interpreted the third prong of the plain error test as requiring a defendant to show in absolute terms that the result would have been different. The Eleventh Circuit is looking for an affirmative statement in the record that the District Judge would go lower if only he could. As has been found by so many other courts, the Eleventh Circuit is wrong.

The defendant need only show a reasonable probability that the sentence, imposed by a Judge under an unconstitutional, mandatory, guidelines scheme, would be lower. Said another way, the Eleventh Circuit should be asking the question: is our confidence in the outcome undermined? The Sixth Circuit has found that where the District Judge has sentenced to the low end of the range and expressed sympathy for the defendant, that is sufficient to undermine confidence in the outcome. *See United States v. Hamm*, 400 F. 3d 336 (6th Cir. 2005).

The Eleventh Circuit, the Eighth Circuit and the Fifth Circuit have specifically found that a sentence at the lowest end of the then mandatory guideline range, without more, is not sufficient to raise a reasonable probability that the court may have imposed a lesser sentence under a non-mandatory guideline scheme. *See United States v. Fields*, 408 F. 3d 1356 (11th Cir. 2005); *United States v. Demarick*, No. 04-15136 (11th Cir. July 12, 2005); *United States v. Leisure*, 412 F. 3d 857 (8th Cir. 2005); *United States v. Ellefson*, No. 04-1293 (8th Cir. August 23, 2005); *United States v. Espinoza-Gamez*, No. 04-50415 (5th Cir.

June 3, 2005). Implicitly, the Eleventh Circuit's decision in the instant case of Wendy Lalan, also finds that the sentence at the lowest end of the guideline range, even with the significant evidence presented for a downward departure and expressions of sympathy from the District Judge, were insufficient to meet the third prong of the plain error test in the Eleventh Circuit.

This is directly at odds with other circuits which have expressly found that a sentence at the lowest end of the guideline range available under the then-mandatory scheme was sufficient to meet the third prong of the plain error analysis. *See United States v. Henry*, 408 F. 3d 930 (7th Cir. 2005); *United States v. Hamm*, 400 F. 3d 336 (6th Cir. 2005); *United States v. Rone*, No. 04-5682 (6th Cir. July 27, 2005).

Some of the Circuit Courts have adopted a presumed prejudice standard due to the radical sweeping change in the sentencing regime, noting the difficulty criminal defendants will have demonstrating that their sentence would have been different. *See United States v. Barnett*, 398 F. 3d 516 (6th Cir. 2005). The Second Circuit observed that it is "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guidelines sentence." *United States v. Crosby*, 397 F. 3d 103 (2d Cir. 2005). The Third Circuit, in *United States v. Davis*, 407 F. 3d 162 (3rd Cir. 2005) ordered the remand of every case pending on direct review with a *Booker* sentencing issue in order to:

> [E]nsure that each defendant to whom *Booker* applies is sentenced accordingly. This approach results in uniform treatment of post-*Booker* defendants on direct appeal, fostering certainty in

> the administration of justice and efficient use of judicial resources. Moreover, as the Court of Appeals for the Second Circuit has noted, "correction of error in the context of sentencing does not precipitate . . . burdensome and often lengthy consequence[s]" on remand. [cite omitted]

Id. at 165-166. The Ninth Circuit, as well, advocates a limited remand to determine the issue of whether the sentencing court would have sentenced differently under a non-mandatory guideline scheme. *See United States v. Ameline*, 409 F. 3d 1073 (9th Cir. 2005). The Ninth Circuit noted the inherent unfairness of requiring the defendant to show that the District Judge would have imposed a different sentence when at the time there was no reason for the sentencing court to so indicate. *Id.* at 1080.

> To leave standing [a] sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity, or public reputation of the judicial proceedings.

United States v. Hughes, 396 F. 3d 374 (4th Cir. 2005).

Rather than considering why it stands criticized for its rigid application of the plain error analysis, the Eleventh Circuit has simply turned this Court's decision in *Booker* into a lottery of sorts. If a defendant is fortunate enough to have a more talkative judge, there may be something in the record to meet the incredibly high standard of proof the Eleventh Circuit has set for the third prong of the analysis. However, a less chatty district judge who simply listens and imposes a sentence at the lowest end of the then mandatory guideline range will not have provided a defendant with the magic words required to obtain a new sentencing in the Eleventh Circuit. *See United States v. Antonakopoulos*, 399 F. 3d 68, 81 (1st Cir.

2005) ("The existence of prejudice should not turn on how vocal the district judge was.").

Concurring in *Ameline*, 408 F. 3d at 1105, Judge Gould noted:

> [I]t would be most unfair and unreasonable for us to ground our prejudice on the fortuity of whether a defendant was sentenced by a particular sentencing judge who openly criticized the Guidelines or indicated that they were unduly harsh as applied to a particular defendant rather than one who felt constrained to quietly follow the law. Our judicial system is predicated on judges following the law, and, so far as is humanly possible, keeping their personal opinions to themselves.

Similarly, defendants who have the misfortune of having the Eleventh Circuit review their *Booker* claims, are having their unconstitutional sentences reviewed under a different, higher, standard than other defendants around the nation.

Thus, the writ in this case should be granted for two significant reasons:

1. There is a distinct and obvious conflict between the circuits on the application of the plain error analysis to *Booker* cases which cannot be reconciled; and,

2. It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person. *See United States v. Paladino*, 401 F. 3d 471, 483 (7th Cir. 2005).

CONCLUSION

The Eleventh Circuit has incorrectly applied the plain error analysis to the petitioner's claim under *Booker* to have her unconstitutional sentence vacated. The Eleventh Circuit's decision is in conflict with the other circuits and results in a miscarriage of justice. For the reasons stated above, this Court should grant Petitioner's writ of certiorari.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11114

D. C. Docket No. 02-00155-CR-4-1

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(Filed April 12, 2005)

Before BARKETT, KRAVITCH and FARRIS*, Circuit Judges.

BARKETT, Circuit Judge:

Shiraz Dhanani, Amzad Lalani, and Wendy Lalani appeal their convictions and sentences for transporting in

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

interstate commerce stolen goods of at least $5,000 in value, as well as conspiracy to do so, in violation of 18 U.S.C. §§ 371 and 2314. All three were convicted after a jury trial on September 17, 2003. On February 18, 2004, the district court sentenced Dhanani and Wendy Lalani to 63 months' imprisonment each, and sentenced Amzad Lalani to 121 months' imprisonment.

We have carefully considered the record as it relates to all three appellants and are satisfied that there is sufficient evidence to support the jury's verdict. *See United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999) ("A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence."). We also find no merit in any of the appellants' other challenges to their convictions.

We likewise find no error in the sentences imposed by the district court. In particular, any error under *United States v. Booker*, __ U.S. ___, 125 S.Ct. 738 (2005), fails the third prong of plain error review as interpreted by *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005).

AFFIRMED.

United States Court Of Appeals
For the Eleventh Circuit

No. 04-11114

District Court Docket No.
02-00155-CR-4-1

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

JUDGMENT

(Filed Apr. 12, 2005)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: April 12, 2005
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

ISSUED AS MANDATE

JUL 07 2005

U.S. COURT OF APPEALS
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11114-II

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Jun. 8, 2005)

Before: BARKETT, KRAVITCH and FARRIS*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rose Barkett
UNITED STATES CIRCUIT JUDGE